TALASCO INSURANCE SDN BHD

v.

INDUSTRIAL COURT OF MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING MOTION NO: R1-25-141-94]
9 JULY 1997

LABOUR LAW: *Employment - Constructive dismissal - Reorganisation of company - No change in terms & conditions of service - Industrial Court - Award - Reference by minister - Industrial Relations Act 1967, ss. 20 & 30(9)*

This was an application by the applicant, the former employer of the 2nd respondent, for an order of *certiorari* to quash the earlier Awards made by the Industrial Court (the '1st respondent') under the Industrial Relations Act 1967 ('the Act').

The 2nd respondent had commenced employment with the applicant in December 1974 as an assistant accountant and was promoted to the position of chief accountant in January 1981 where he headed the accounts division which was one of the then four divisions in the applicant company. As the head of the accounts division, he reported to the general manager of the company.

For better management of the company, the four divisions were subsequently reduced to two major functions of operations and support services. Consequent thereof, in January 1988 the 2nd respondent was re-designated as accountant (corporate) which came under the support services division headed by a newly recruited Abu Bakar bin Man who was designated as senior manager, finance and administration. The 2nd respondent was not happy with the arrangement of having to report to a new recruit. Apart from this change, the 2nd respondent's responsibilites, salary and all other terms and conditions of service with the applicant remained unchanged. The 2nd respondent also alleged that he was asked to move into a smaller room. He also alleged that his former subordinates no longer report to him and that he was asked to do the jobs formerly done by his subordinates.

On account of all these changes, the 2nd respondent considered himself to have been demoted and thereby constructively dismissed by the applicant. He abandoned his employment with the applicant and refused to return to work despite several requests by the management for him to do so. The 2nd

respondent then made representations under s. 20(1) of the Act and the representations were referred by the Minister to the 1st respondent.

The 1st respondent found that the 2nd respondent had been constructively dismissed by the applicant without just cause or excuse and ordered the applicant to pay compensation and backwages in lieu to the 2nd respondent ('the First Award'). A subsequent award was made pursuant to s. 30(9) of the Act stipulating the time period for payment of the amount ordered in the First Award ('the Second Award').

The present application of the applicant was grounded on the improper jurisdiction or the absurdity of the decision of the 1st respondent in the making of the two Awards. The issue before the Court was whether the 2nd respondent was dismissed by the applicant within the meaning of the Act.

Held:

[1] The phrase "constructively dismissed" as used by the 1st respondent was a mere label and would not serve any useful purpose in clarifying matters. On the other hand, it would cause confusion and it would be better not to resort to the phrase at all.

[2] The reason for the reorganisation of the applicant was to make its business a viable and profitable venture. The applicant was running into debts and even the possibility of winding-up as insurance claims had exceeded its paid-up capital. Employers must not be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise.

[3] The 1st respondent had gone too far in the purported exercise of its jurisdiction to determine whether the 2nd respondent was dismissed by the applicant on account of the reorganisation. It was not for the 1st respondent to decide for the applicant who would be best to perform what function in its organisation. It was the applicant's prerogative to decide who would be more suitable for a particular job for so long as in the making of that decision it acted in good faith and that the 2nd respondent's responsibilities, salary and all other terms and conditions of service with the applicant remained unchanged. Loss of pride alone would not constitute a dismissal of the 2nd respondent by the applicant.

[4] The conduct of the applicant in carrying out its reorganisation exercise had not in any way deprived the 2nd respondent of his proprietary right to earn a living. There was no evidence that the applicant did all that in bad faith towards the 2nd respondent. In the circumstances, it was an error

which affected the jurisdication of the 1st respondent in the making of the two Awards to the effect that the 2nd respondent was dismissed by the applicant without just cause or excuse.

[Application allowed; Awards quashed.]

Cases referred to:
Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***
Woods v. WM Car Services (Peterborough) Ltd [1982] ICR 693 ***(refd)***
Spafax Ltd v. Harrison [1980] IRLR 422 ***(refd)***
Carnie Peter & Son Ltd v. Paton [1979] IRLR 260 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 ***(refd)***
Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 ***(refd)***

Legislation referred to:
Industrial Relation Act 1967, ss. 20(1), 30(9)

For the applicant - Retanavalu Thayalan; M/s VK Lingam & Co
For the respondent - P Kuppusamy; M/s Kuppusamy & Co

JUDGMENT

Abdul Kadir Sulaiman J:

The applicant is the former employer of the 2nd respondent workman. The applicant applies for an order of *certiorari* to quash Award No. 512 of 1994 dated 17 November 1994 (hereinafter referred to as "First Award"), and the Rectification Award dated 12 December 1994 (hereinafter referred to as "the Second Award"), made by the Industrial Court, the 1st respondent, under the Industrial Relations Act 1967 (hereinafter referred to as "the Act"). The First Award found that the 2nd respondent was constructively dismissed by the applicant without just cause or excuse and instead of ordering for 2nd respondent's reinstatement in his former employment, the applicant was ordered to pay compensation and backwages in lieu. The Second Award was purportedly made pursuant to s. 30(9) of the Act stipulating the time period for payment of the amount ordered in the First Award. This application of the applicant is grounded on the improper jurisdiction or the absurdity of the decision of the Industrial Court in the making of the two Awards.

The facts are that the 2nd respondent commenced employment with the applicant on 24 December 1974 as an assistant accountant. On 1 January 1981 he was promoted to the position of a chief accountant with a salary of RM4,350 per month beside other allowances. He headed the accounts Division which was one of the then four divisions in the applicant company. As the head of the accounts division he reported to the general manager of the company. For better management of the company the four divisions were

reduced to two major functions of operations and support services. Consequent upon this re-organisation, the 2nd respondent was on 4 January 1988 orally informed by the chief executive of the applicant that his job title was re-designated as accountant (corporate) which came under the support services. This support services was now a substantially enlarged division headed by a newly recruited Abu Bakar bin Man and designated as senior manager, finance and administration. Being the head, Abu Bakar bin Man became the 2nd respondent's immediate superior. Consequently the 2nd respondent was required to report to him. The 2nd respondent was not happy with the arrangement for having to report to a new recruit. But, apart from this change the 2nd respondent's responsibilities, salary and all other terms and conditions of service with the applicant remained unchanged. The 2nd respondent also alleged that on account of this reorganisation he was asked to move into a smaller room. He also alleged that his former subordinates were no longer reporting themselves to him and he was asked to do the jobs formerly done by his subordinates. On account of all these changes, the 2nd respondent considered himself to have been demoted and thereby constructively dismissed by the applicant. He abandoned his employment with the applicant and refused to return to work despite several requests by the management for him to do so. He made representations under s. 20(1) of the Act and the representations were referred by the Minister to the 1st respondent for an award under the Act. Consequent to this the 1st respondent made the two Awards earlier mentioned.

At p. 13 of the First Award the 1st respondent said in regard to the 2nd respondent's dismissal:

> The six reasons given by the claimant for his dismissal showed the loss of confidence in the claimant by the company. These claim of acts on the part of the company amounted to demotion and embarrassment to the claimant. These repudiatory acts on the part of the company either cumulatively or individually establish a strong and indefensible case of constructive dismissal by the company. Also see *Lewis v. Motorworld Garages Ltd.* [1985] IRLR 465.
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> For the above reasons and based on the facts and evidence adduced, this Court finds that the claimant was entitled to plead constructive dismissal and that his dismissal by the company was without just cause or excuse.

For the purpose of this application all that matters is whether the 2nd respondent was dismissed by the applicant within the meaning of the Act. In *Amanah Butler (M) Sdn. Bhd. v. Yik Chee Wah,* Civil Appeal No. W-04-10-1994 the Court of Appeal said:

> No useful purpose will be served by saying whether the respondent was 'constructively dismissed'. The phrase constructive dismissal is a mere label. It does nothing to clarify matters. On the other hand, it causes confusion. It is better that the phrase be not resorted to at all: *Ang Beng Teik v. Pan Global Textile Bhd.* [1996] 3 MLJ 137.

> Unfortunately the Industrial Court paid too much attention to it. That's why it went wrong – in the jurisdictional sense.

Before the Industrial Court, the applicant through its evidence gave reasons for the reorganisation. The applicant was running into debts and even the possibility of winding up as the insurance claims exceeded its paid up capital. Without resorting to the retrenchment of its employees the applicant decided to revamp and reorganise itself to make the business a viable and profitable venture. Hence the restructuring of the applicant company as stated above. If this is the genuine intention of the applicant, the employees cannot complain for in *Woods v. WM Car Services (Peterborough) Ltd.* [1982] ICR 693, Watkins LJ in the Court of Appeal at p. 702 said:

> Employers must not, in my opinion, be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise.

One of the reasons put forward by the 2nd respondent was that he was asked to report to someone who had just been recruited and was in the same salary sector. From the evidence, Abu Bakar bin Man was at the material time drawing a salary of RM4,575 per month, a higher salary scale in the sector. It is also in evidence that Abu Bakar bin Man possessed a higher educational qualification than the 2nd respondent and had wide and varied practical experience before joining the applicant. But the 1st respondent in holding that the 2nd respondent was constructively dismissed said this at p. 7 of the First Award:

> It is the Court's view that it is wrong to Judge a person from his qualification alone. Both of them were in the same rank as Senior Personnel. Therefore one has to consider whether the claimant was an able person to handle his job well. The company had not complained as to the claimant's lack in terms of ability or trustworthiness. There was no disciplinary action taken against the claimant ...

> On the other hand, the Senior Manager, Encik Abu Bakar bin Man, though he has higher qualification, the company has not proven his ability. Therefore with regret this Court does not accept the comparison of these two persons made by the Counsel for the company.

With respect, the 1st respondent had gone too far in the purported exercise of his jurisdiction to determine whether the 2nd respondent was dismissed by the applicant on account of the reorganisation. It is not for the 1st respondent to decide for the applicant who is best to perform what function in its organisation. More so in this case it is not denied that Abu Bakar bin Man in relation to the 2nd respondent possessed a higher qualification. It is the applicant's prerogative to decide who is more suitable for a particular job for so long as in the making of the decision, it acted in good faith and that the 2nd respondent's responsibilities, salary and all other terms and conditions of service with the applicant remained unchanged. It may result in the loss of pride for the 2nd respondent to be the subordinate of the newly appointed immediate superior. But this loss of pride alone would not constitute a dismissal of the 2nd respondent by the applicant. In the circumstances, the fact that the 2nd respondent was asked to report to this newly appointed senior manager, finance and administration, who is his immediate superior on account of the reorganisation and his change of designation to accountant (corporate) could not in substance or in fact or in law, be considered a demotion of the 2nd respondent. Therefore, the 1st respondent had acted outside its jurisdiction in taking into consideration irrelevant matters.

In relation to the allegation that as a result of the reorganisation of the applicant, the 2nd respondent was moved to a smaller room, there was in the evidence that the entire support services division of which the 2nd respondent was now part of it, was located on one floor but the 2nd respondent was then occupying a room on a different floor under the old set up. For that reason the 2nd respondent was asked to be on the same floor as the others in the new support services division which room happened to be smaller than he was then occupying. The 2nd respondent considered this a demotion simply because this room was formerly occupied by an assistant manager. The Industrial Court at p. 9 of the First Award in providing basis for the dismissal of the 2nd respondent by the applicant states:

> The claimant was even asked to move to a room next to the Senior Manager. According to the claimant this room was rather small and was formerly occupied by the Assistant Manager of underwriting. If the company had not altered his position and considered him as the man in charge of his division why change his room where he was comfortable.

But in the light of the evidence providing reason for the change of the 2nd respondent's room the reasoning given by the Industrial Court cannot any longer sustain so much so that the decision becomes so perverse or irrational that no reasonable person would have arrived at such a decision. The 1st respondent, in the light of the evidence before it, has also acted beyond its jurisdiction in coming to the conclusion that the 2nd respondent was dismissed by the applicant, by not taking into consideration the relevant matters.

Another reason provided by the 2nd respondent for his dismissal was that he was not informed by the applicant of the redesignation and change of work. The Industrial Court held that this reason coupled with the other reasons given showed the loss of confidence in the 2nd respondent by the applicant and amounted to demotion and embarrassment to the 2nd respondent. Hence, the dismissal of the 2nd respondent by the applicant. But on the 2nd respondent's own evidence it clearly shows that he had been orally informed by the principal officer of the applicant on 4 January that his post as chief accountant was changed to accountant (corporate). From the evidence adduced there was no change in the duties of the 2nd respondent after the re-organisation. As accountant (corporate) he was still carrying out the same responsibilities as the former chief accountant in charge of life insurance accounts, general insurance accounts and credit control. There was also no change in his salary and perks hitherto enjoyed by him. The only change brought about by the reorganisation was that he was to report to a new head, Abu Bakar bin Man, who had just been recruited to head the new support services division where the 2nd respondent was in. It is merely a loss of pride in the 2nd respondent in having to report to a new superior. What if there is no reorganisation but he is to continue reporting to the general manager but it so happened that this general manager was replaced by a newly recruited general manager? Can the 2nd respondent say that he was dismissed because he was required to report to a new general manager who joined service later than him? The learned Counsel for the 2nd respondent submitted that the line of reporting in any corporation reflects one's position in the hierarchy of the corporation. If a person who has been reporting to the chief executive of the company is suddenly asked to report to somebody who was of the same rank and who has also been reporting to the chief executive, then this would be an indicator of demotion by supercession. In the circumstances of this case, in the light of the evidence, I cannot agree with the line of submission of the learned Counsel. The issue really is whether there was any change in the terms and conditions of his service which work to his disadvantage on account of this re-organisation? In *Spafax Ltd. v. Harrison* [1980] IRLR 422 the Court of Appeal held that in order for conduct by the employer to amount to a repudiation of the contract of employment amounting to dismissal, there must be a breach of some term of the contract, express or implied and the breach must be so fundamental as to evince an intention not to be bound by the contract. In the present case, so as to keep the 2nd respondent in the service, the applicant cannot be prevented from going ahead with its plan for the better management of his enterprise instead of going for a retrenchment of its employees. A worse situation appeared in *Woods v. WM Car Services (Peterborough) Ltd.* [1982] ICR 693. In that case the appellant was employed for 27 years as chief secretary/accounts clerk when the owners sold the

business. The new owners changed her job title, asked her to accept a reduction in wages which she refused, asked her to work long hours, gave her a verbal and written warning as to her conduct, revised the terms and conditions of the employment and introduced new accountancy procedures which entitled her spending 80% of her time doing accounts. She was then given a new job specification prepared by the company's accountants and if she would not accept the position, she would be dismissed. She resigned and claimed she was constructively dismissed. The Industrial Tribunal held that the work the appellant was required to do was within the terms of the contract and that the company was not guilty of any repudiatory breach of contract. The employment appeal tribunal dismissed her appeal. Her appeal to the Court of Appeal was also dismissed and it was held by the Court of Appeal that the Industrial Tribunal's conclusion that the changes to her duties proposed by the respondent company did not justify her in claiming constructive dismissal, could not be held to have been perverse. The obdurate refusal of the appellant to accept conditions very properly and sensibly being sought to be imposed upon her was unreasonable. Watkins LJ held at p. 702 that:

> Employers must not, in my opinion, be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise.

In the case of *Carnie Peter & Son Ltd. v. Paton* [1979] IRLR 260 it was held that an employee cannot claim constructive dismissal merely because he is moved away from that part of his job which he enjoys the most on to less interesting work, if he is contractually obliged to do that work. Similarly, in the circumstances that happened to the 2nd respondent, the 1st respondent had fallen into error in holding that the 2nd respondent was dismissed by the applicant.

The case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92 is not in point in the context of the facts prevailing here. In that case the workman was demoted from the position of personnel and industrial relations manager of the company, the head of one of the company's departments to a mere cinema manager, a position he had held some fifteen years earlier as a junior executive. But in the present case, such a situation did not arise. The applicant remained doing accounting works with subordinates under him. Encik Abu Bakar bin Man as the head of new support services apart from having the accounts sections under him, had to take charge of eight sections in all.

The factual matrix in *Ang Beng Teik v. Pan Global Textile Bhd. Penang* [1996] 3 MLJ 137 is again dissimilar. In that case the employer reduced the workman in rank by writing a letter to him informing him of the demotion which was to take effect the following day. The Court of Appeal in that case said that whether the conduct complained of was in truth a dismissal cloaked as something else is a question of fact. That being the case, the learned Counsel in the present application, in his submission, says that the determination of a question of fact is not amenable to be quashed by an order of *certiorari*. But if the deduction from the facts found results in the absurdity then the decider has committed what is called the "Wednesbury" error which is amenable.

The conduct of the applicant in carrying out its reorganisation exercise has not in any way deprived the 2nd respondent of his proprietary right to earn a living. There was no evidence that the applicant did all that in bad faith towards the 2nd respondent. In the circumstances, it is an error which affects the jurisdiction of the 1st respondent in the making of the two Awards to the effect that the 2nd respondent was dismissed by the applicant without just cause or excuse.

For all the reasons stated, I allow the application of the applicant and hereby quash the First Award and consequentially the Second Award, with costs to the applicant.

Reported by Ling Hea Hoon